United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1654

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

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IN THE MATTER OF JERRY LANGELLA,

Appellant.

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BRIEF ON BEHALF OF APPELLANT LANGELLA

GUSTAVE H. NEWMAN
Attorney for Appellant LANGELLA
522 Fifth Avenue
New York, New York 10036
Telephone: (212) MU 2-4066

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APPELLANT'S BRIEF

STATEMENT OF THE CASE

The appellant was subpeonaed before a Grand Jury in the Eastern District of New York. After a series of adjournments, he appeared as required on April 17, 1974. He requested that he be advised whether electronic interception was employed and was advised that an eavesdropping device was employed in another person's residence and that his voice was recorded. He asked for at least an in-camera examination of the Court order. This was denied on the theory that the orders had already been examined by a Judge of coordinate jurisdiction, ie., Judge Judd, In The Matter Of Alphonse Persico, 491 F2d 1156 (2 Cir : 1974). The appellant was advised that immunity had been conferred upon him by an order of Judge Bartels. (52) He was then directed to return and testify. He raised an objection on the grounds that a question asked of him was identical to that asked of him before a New York State grand jury where he had testified and

received transactional immunity. When he failed to testify, he was adjudicated in contempt and sentenced orally for Civil Contempt until he testifies or until the Grand Jury as it may be extended expires. He has remained incarcerated since that date. In the interim, the appellant, pursuant to Title 28, U.S.C., Section 2101(e) and in light of the ruling by this Court in In The Matter of Alphonse Persico (supra), sought to appeal directly to the Supreme Court prior to a judgment from this Court by joining his application for certiorari together with that of appellant Persico. The Solicitor General in his brief in opposition to the petition contended that the petitioner LANGELLA'S application was premature despite the Second Circuit's ruling in Persico (supra) on the grounds that a different panel of the Court might rule differently in Langella's case.

The United States Supreme Court denied the petition for certiorari.

While the petition was pending, the appellant filed a series of motions with Judge Dooling to vacate the adjudication of contempt on a variety of grounds.

Firstly, that the documents be examined on the basis of the decision in U.S. v. Giordano, 94 S.Ct. 1820 (1974), and also upon the authority of In Re Lochiatto, 497 F2d 804 (1st Cir : 1974). The Court referred the application on the Giordano point to Judge Bartels who denied the application. He further denied the application for reconsideration based upon the decision in Lochiatto (supra).

Secondly, that the application for immunity was made by the head of the Strike Force rather than the United States Attorney for the District as mandated by In Re DiBella, 499 F2d 1175 (2 Cir : 1974). The Judge denied the motion.

The grand jury was extended by an order dated August 26, 1974 for an additional six months to March 19, 1974.

Thirdly, the appellant moved for reconsideration on the joint grounds that the order of contempt incarcerated the appellant for the life of the grand jury but did not indicate that it was to include extensions and that there should, in fact, be a showing pursuant to Title 18, U.S.C., Section 3331(a) that the particular investigation for which the witness' testimony was sought was being continued.

Judge Dooling denied the motion on both grounds.

Notices of Appeal were filed after each of the aforementioned denials and also after the original adjudication of contempt.

Pending the decision on the petition for certiorari, the appellant moved for an extention of time to file his brief and his appeal to this Court and the motion was granted extending his time to file his brief until December 6th, 1974.

POINT I

THE ORDER ADJUDICATING THE APPELLANT IN CONTEMPT SHOULD BE SET ASIDE PENDING AN EXAMINATION OF THE EAVESDROPPING ORDERS AND AFFIDAVITS BY HIS COUNSEL.

A panel of this Court in In The Matter of Alphonse Persico, 491 F2d 1156 (2 Cir : 1974), held that the witness was entitled to have the orders and affidavits examined in-camera by the District Court Judge.

Thereafter, the First Circuit Court of Appeals in In Re Lochiatto (supra) reversed a contempt conviction. In that decision, the Court held that the counsel for the witness had the right to examine the order and affidavit. In so doing, the Court recognized the problem as one of balancing of equities. They tried to reach a middle ground of balancing the rights of the witness and the need for secrecy. The decision diverged from the reasoning in Persico (supra).

The Court sought to strike a balance between the plenary evidentiary hearing with full disclosure to test not only the validity of the Court order but also the truth of the material in the affidavit and the Government affidavit attesting to the legality of the procedure.

They acknowledged their divergence from the reasoning of the Persico case (supra) stating on page 806, footnote 7:

> "...In reaching this conclusion, the Persico Court placed heavy reliance upon Senate reports. The reasoning of the particular Senate Report relied upon, S.Rep. No. 1097,

was rejected in other respects in
Gelbard, supra, 408 U.S. at 60."

The Court in Lochiatto (supra) took cognizance of the policy statements in U.S. v. Calandra, 414 U.S. 338, Gelbard v. U.S., 92 S.Ct. 2357 (1972), and U.S. v. Dionisio, 410 U.S. 1, 93 S.Ct. 764 (1973), against the unnecessary delay of grand jury proceeding. However, they went on to hold that this does not prevent some disclosure and went on to note the general Congressional skepticism about electronic monitoring. They noted this in connection with the exemption of electronic interception from the holding of the Calandra case (supra).

The method that they devised for the balancing of the conflicting equities, ie., minimize delay, protect secrecy and to protect a witness' rights to assert defenses would allow inspection of the order and affidavit by counsel for the witness, with the question of secrecy to be worked out by the supervising Judge making an in-camera inspection. This is, of course, not an unusual procedure and has been followed extensively in connection with reconciling the conflicts of interest that may arise in regard to disputed 3500 material.

Thus, the issue was squarely drawn between the First Circuit in Lochiatto (supra) and a panel of this Court in Persico (supra).

The procedure requested by the appellant at bar was granted by a District Judge in another posture prior to the Lochiatto decision (supra). In Vigorito, et. al. v. U.S.,

three individuals whose voices were intercepted were subpoenaed before a grand jury in the Eastern District but they were not requested to testify. Instead, voice exemplars were taken of them. Prior to same being used before the grand jury, they instituted an action pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure to suppress the use of the recordings and for the return of their property. Judge Dooling as a prelude to a hearing ordered that the Government deliver the orders and affidavits to the attorney for the plaintiffs. When the Government refused to comply, he enjoined them from presenting the recordings of the three plaintiffs to the grand jury. The Government appealed and Judge Dooling's order was reversed. (499 F2d 1351 (2 Cir : 1974)).

Shortly thereafter, Lochiatto (supra) was decided. Counsel for the plaintiffs in Vigorito (supra) moved for a stay of the mandate pending an appeal to the Supreme Court based upon the Lochiatto decision (supra). That motion was granted on August 14, 1974 by a panel consisting of Judges Lumbard and Hays. This would seem to indicate a recognition of at least one panel of this Court of the compelling reasoning of Lochiatto (supra) and that the decision in Persico (supra) has not laid the issue to rest.

The Solicitor General in his reply to our previously mentioned petition for certiorari did not address himself to the merits of Langella's petition. He contented himself with a claim that it was premature in the following language on page 3:

> "The case, however, has not yet been heard or decided by the court of appeals, and the petition is premature.
>
> Rule 20 of the Rules of this Court provides that "[a] writ of certiorari to review a case pending in a court of appeals, before judgment is given in such court, will be granted only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settlement in this Court." That test is not met here, and Langella's only justification for seeking to bypass the court of appeals is the insufficient contention that his arguments are foreclosed by that court's decision in the case involving petitioner Persico. Believing that Langella's petition should be denied as premature, we do not address the specific circumstances of his contempt conviction."

And footnote 3 on the same page:

> "The panel that affirmed Persico's conviction included only one active circuit judge, and Langella's chances of obtaining a different ruling from a different panel are not insignificant, particularly in light of a subsequent somewhat contrary ruling by another court of appeals (see p. 14, infra, n.11)."

Thus, it might be suggested that the Solicitor General recognizes that this Court is not bound by the earlier Persico decision (supra) particularly in the light of Lochiatto (supra) and its reasoning.

It is respectfully submitted that permitting defense counsel to examine the orders and affidavits under appropriate safeguards would permit counsel to point out to the District Judge any prima-facia inadequacies either in the order or the underlying affidavits. While we recognize the fact that under Persico (supra) the Court examines the affidavits and orders

with a view to prima-facia propriety, it is submitted that there is always that gray area that may be ascertained by an advocate's examination which he could then direct to the Court's attention. For example, there may be a Kahn problem. That is, the party whose voice was intercepted may not be listed in the order and he may be a known associate of the party whose name was listed in the order and the District Judge may be unaware of this whereas counsel for the witness may be more familiar with these facts.

This is just one example of an area where the advocate could be of assistance in the Court's examination to determine prima-facia insufficiency.

I have not burdened this Court in this Point with an in depth analysis of the Persico case (supra) for I know this Court is familiar with it and it seems to me that the basis for the distinction between Persico (supra) and Lochiatto (supra) is the difference in emphasis placed on the interpretation of Section 2518 of Title 18, United States Code.

We respectfully urge upon this Court a reconsideration in effect of the position in Persico (supra) and a reconciliation with the Lochiatto opinion (supra) as providing a more equitable resolution of the conflicting interest, ie., that of the witness and that of the Government.

POINT II

THE IMMUNITY ORDER WAS INVALID.

Title 18, United States Code, Section 6003(b) provides as follows:

> "A United States Attorney may, with the approval of the Attorney General . . . request an order under subsection a of this section when. . ."

The requirement then is that a United States Attorney apply to the Court for the order of immunity. On the motion below, Judge Dooling denied the motion based upon this contention on the ground that the order of immunity contained a recital that it was applied for by the United States Attorney. It is respectfully submitted that this was in error.

In a recent decision in In Re DiBella, 499 F2d 1175 (2 Cir : 1974), this Court had occasion to consider the issue of who should apply for immunity. The Court did not have to reach the issue at bar because the District Court Judge had the United States Attorney apply for immunity order nunc-pro-tunc. The Court, however, went on to say at page 1178 in answer to the Special Prosecutor's general assertion that it made no difference who applied as follows:

> "But in the exercise of our supervisory power over a procedure that will obviously recur, we note that the wiser course in the future would be to directly involve the United States Attorney in the application to a district court for an immunity order."

We submit that the application at bar predated the DiBella (supra) application and therefore it is not idle speculation to suggest it was not made by the United States Attorney. Therefore, despite the contents of the order, the actual application controls under the authority of DiBella (supra) and at the least the matter should be returned to the District Court for an inquiry as to who applied for the actual immunity order and if it turns out to be the Special Attorney rather than the United States Attorney, then the contempt adjudication should be set aside on the grounds that the immunity order is insufficient.

POINT III

THE ORDER EXTENDING THE GRAND JURY ON MARCH 26, 1974 FOR A SIX MONTH PERIOD FROM SEPTEMBER 19, 1974 WAS INVALID.

The appellant moved before Judge Dooling for an order discharging the Grand Jury before which he was called as a witness. That Grand Jury was scheduled to expire on September 19, 1974. Prior to that date and more particularly on August 26, 1974, a motion was made to extend that Grand Jury for an additional six months. That motion was based on an affidavit by the attorney in charge of the Eastern Dis trict Strike Force office. A copy of that affidavit was annexed to the motion before Judge Dooling as Exhibit "C". In that affidavit there was no indication to the Chief Judge who extended the Grand Jury, the Honorable Jacob Mishler, that as a result of that extention, this appellant would be effected by his continued incarceration for a six month period.

Although I am familiar with the enabling legislation concerning Special Grand Juries, nevertheless, it is submitted that under the equity jurisdiction of this Court and of the District Court, the important fact of the continued imprisonment of a party should have been called to the attention of the extending Judge so that he might have an opportunity to determine whether in light of this important circumstance the interests of justice might not have been better served by submitting outstanding matters to other grand juries. Upon information

and belief, other Special Grand Juries are empanelled and are currently sitting. Despite the broad powers of the grand jury, the law is clear that they remain subject to the supervision of the Court. See: Branzburg v. Hayes, 92 S.Ct. 2646 (1972); U.S. v. Dionisio, 93 S.Ct. 764 (1973).

In this vein, the Courts have frowned upon the grand jury becoming roving commissions or being utilized to obtain an indictment for perjury when there is no substantive evidence to otherwise indict. See: Brown v. U.S., 245 F2d 549 (8 Cir : 1957).

In a recent opinion in this Circuit, in U.S. v. Fein, slip opinion decided October 15, 1974 at page 5759, the Court strictly construed the section 6(a) enabling legislation for a grand jury and held the Government to a strict observance of those provisions.

Although we have no precise provision on the subject we are advancing, we respectfully request that the interests of justice and due process and this Court's general supervisory power over the grand jury require that full disclosure be made before a grand jury be extended.

It is not inconceivable that this ability to extend a grand jury on the barest of affidavits may result in 18 month incarceration of persons although there is no substantive evidence of wrongdoing on their part sufficient to indict, try and convict them.

C O N C L U S I O N

THAT THE ORDER OF CONTEMPT BE SET ASIDE AND THE APPELLANT RELEASED.

Respectfully submitted,

GUSTAVE H. NEWMAN
Attorney for Appellant Langella
522 Fifth Avenue
New York, New York 10036
Telephone: (212) MU 2-4066

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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IN THE MATTER OF JERRY LANGELLA,

74-1654

Appellant.

----------x

STATE OF NEW YORK)
) SS:
COUNTY OF NEW YORK)

GWENN AGRESS, being duly sworn on oath, deposes and states that deponent is not a party to the action, is over 18 years of age and resides at New York, New York. That on the 27 day of November, 1974, deponent served the within Brief and Appendix upon the Honorable David Trager, United States Attorney, Eastern District of New York, 225 Cadman Plaza East, Brooklyn, New York, the attorneys for the United States in this action, by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in-a post office-official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Gwenn Agress

GWENN AGRESS

SWORN TO before me this 27
day of November, 1974.

Lenore Berg

LENORE BERG
Commissioner of Deeds
City of New York No. 2-1352
Certificate Filed in New York County
Commission Expires Aug. 2, 19..

☐ INDIVIDUAL VERIFICATION

STATE OF NEW YORK, COUNTY OF ss.:

, being duly sworn, deposes and says, that deponent is the in the within action; that deponent has read the foregoing and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true.

☐ CORPORATE VERIFICATION

deponent is the of the corporation named in the within action; that deponent has read the foregoing and knows the contents thereof; and that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true. This verification is made by deponent because is a corporation. Deponent is an officer thereof, to-wit, its The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me, this day of 19 .....

☐ ATTORNEY'S AFFIRMATION

STATE OF NEW YORK, COUNTY OF ss.:

The undersigned, an attorney admitted to practice in the courts of New York State; shows, that deponent is the attorney(s) of record for in the within action; that deponent has read the foregoing and knows the contents thereof; that same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. Deponent further says that the reason this verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

☐ CERTIFICATION BY ATTORNEY

certifies that the within has been compared by the undersigned with the original and found to be a true and complete copy.

Dated: .....

☐ AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK, COUNTY OF ss.:

being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at

That on the day of 19 deponent served the within upon attorney(s) for in this action, at the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in-a post office-official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

☐ AFFIDAVIT OF PERSONAL SERVICE

upon the herein, by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the therein.

Sworn to before me, this day of 19

.....